



U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

December 29, 2017

By ECF and Fax

The Honorable Nicholas G. Garaufis
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Batalla Vidal, et al., v. Nielsen, et al.*, 16-cv-4756 (NGG) (JO)
State of New York, et al., v. Trump, et al., 17-cv-5228 (NGG) (JO)

Dear Judge Garaufis:

As this Court is aware, on December 27, 2017, the U.S. Court of Appeals for the Second Circuit denied the government's petition for a writ of mandamus regarding the scope of the administrative record and discovery in the above-captioned matters. The court of appeals noted, however, the Supreme Court's suggestion in the parallel litigation in the Northern District of California that the district court in those cases should consider certifying any ruling on the government's threshold arguments for an interlocutory appeal and staying any further administrative record supplementation and discovery pending those proceedings. The Second Circuit noted that it "may be prudent" for this Court to do the same. Yesterday, the government filed, in this Court, a motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b), ECF No. 219, which also asked for a stay pending further appellate proceedings under Section 1292(b) or the resolution of the pending motions to dismiss and for a preliminary injunction, and an administrative stay pending consideration of the government's motion. The Court has now ordered Plaintiffs to respond to that motion by January 3, 2018, but has not ruled on the government's request for an administrative stay. As a result, the government remains under an immediate obligation, pursuant to Magistrate Judge Orenstein's December 28 Order, *see* ECF No. 217, to compile and review thousands of additional documents for potential inclusion in the administrative record or privilege log, requiring the attention of numerous senior officials within the Department of Homeland Security and Department of Justice.

Earlier today, the Solicitor General of the United States authorized the filing of a petition for a writ of mandamus challenging the scope of the administrative record and discovery in these matters if this Court does not grant the government's motion for certification and a stay of all record supplementation and discovery pending resolution of any further appellate proceedings. Therefore, for the reasons stated in the government's motion for certification under 28 U.S.C. § 1292(b), the government respectfully requests that this Court promptly grant an administrative stay of all immediate obligations for record supplementation and discovery, including compilation and privilege review of any additional materials, pending the resolution of the motion for

certification.¹ Absent prompt relief, the government will face significant burdens between now and January 8, 2018, which will not be remediable after a final judgment. If the Court does not grant an administrative stay or grants such a stay but then denies the government's motion for certification and corresponding stay, pursuant to Supreme Court Rule 23.3, the government also respectfully requests a stay of any further record supplementation or discovery pending the Supreme Court's resolution of the government's forthcoming filing in that Court.

Defendants thank the Court for its consideration of this request.

Respectfully submitted,

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¹ As noted in the government's motion for certification under 28 U.S.C. § 1292(b), the parties met and conferred on December 28, 2017, and Plaintiffs reported that they did not consent to a stay.

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